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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK HAMPTON,

Defendant and Appellant.

F041455

(Super. Ct. No. 1023745)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. A.
Girolami, Judge.

Shama H. Mesiwala, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Jo Graves, Assistant Attorney General, Stan Cross and Janet E. Neeley, Deputy
Attorneys General, for Plaintiff and Respondent.

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Appellant Frank Hampton (defendant) was convicted by jury of inflicting corporal injury resulting in a traumatic condition on a spouse or cohabitant.¹ (Pen. Code, § 273.5.) The court sentenced defendant to a total of four years in prison. On appeal, defendant contends the trial court erred by (1) denying a continuance to allow him to retain private counsel, and (2) admitting evidence of two prior incidents of domestic violence. We affirm.

FACTUAL HISTORY

Defendant and Jane Doe lived together off and on for about nine years. Defendant moved out of Doe's house in December 2000 but moved back in March 2001. On May 7, 2001, defendant and Doe began arguing about buying a Mother's Day gift for Doe's mother. Defendant told Doe that both she and her mother were bitches. He punched Doe in the head and she fell to the floor. Doe's 14-year-old son heard their arguing; he went into the hallway and saw defendant dragging Doe by her hair and arms into the bedroom. When defendant shut and locked the bedroom door, Doe's son called 911. Inside the bedroom, defendant grabbed Doe by her arms, picked her up, and hit her in the face. She fell to the floor again. Defendant ran his fingers across her eyelids, abrading them. He again told her that she and her mother were bitches, then told her to look in the mirror to see what he had done to her.

When the police arrived, Doe's son met them at the door. He was upset. Officer Lewis could hear defendant yelling obscenities. The officers instructed defendant to

¹The jury also found true the following special allegations: that defendant had been convicted of a felony two or more times prior to committing the charged offense (Pen. Code, § 1203, subd. (e)(4)); had been convicted of one or more violations of Penal Code section 273.5 within seven years of the charged offense; had been convicted of a serious felony (Pen. Code, § 667, subd. (d)); and had served a prior prison term (Pen. Code, § 667.5, subd. (b)).

open the bedroom door. Doe was upset and crying. She had abrasions and lacerations on both her eyelids. Her arms were bruised and abraded. She told Lewis she was fearful of defendant and wanted an emergency protective order, which the police obtained for her.

When defendant was questioned, he told Lewis that Doe injured her own eyes while tweezing her eyebrows when defendant was at work.

DISCUSSION

I. Continuance to retain counsel

Defendant contends the trial court violated his Fifth Amendment right to due process and his Sixth Amendment right to counsel when it denied his request for a continuance to retain private counsel. The People counter that because the trial court denied defendant's *Marsden* motion to relieve the public defender,² defendant's day-of-trial request for a continuance to retain new counsel was appropriately denied as untimely.

A. Facts

On the first day of trial, defendant informed the court that he wished to retain private counsel. When the court asked him why he had waited three months, defendant explained that he had obtained the funds only the day before and had spoken to a particular attorney the night before. During the *Marsden* hearing, defendant stated that he found the public defender negative and difficult to communicate with. He said she had never discussed his defense and she had done nothing on his case. He felt he could communicate better with the private attorney. The public defender responded that she had attempted to discuss the case with defendant, but he would only repeatedly tell her

²By making a *Marsden* motion, a defendant may seek new counsel on the basis that his appointed counsel is providing inadequate representation. (*People v. Marsden* (1970) 2 Cal.3d 118.)

that the victim would not show up for trial. He also repeatedly accused counsel of being part of the system that was prosecuting him. Counsel explained for the court the efforts she had made in attempting to speak to defendant, investigate the case, and locate the victim, despite defendant's obstructive lack of assistance.

Defendant explained that he had spoken to the alleged victim the previous day and that she wanted to give him the rest of the money he needed to retain private counsel. Defendant told the court he had consulted with the private attorney but had not yet entered into a contract with him. The court inquired whether defendant had informed the attorney about the trial date so he could appear and take over the case, and the court explained that if the attorney were ready to try the case at 1:30 p.m. that day, the court would allow him to substitute in. Defendant stated that the attorney would appear at 1:30 p.m.

The trial court denied the *Marsden* motion, finding that the public defender was doing an excellent job and that defendant was not assisting in the investigation or defense of his case.³ The court again explained it would allow the private attorney to take over the case only if he was ready to begin jury selection at 1:30 p.m. and that it would consider a continuance only if the prosecution agreed. The prosecution, however, was ready to proceed with the case and objected to a continuance. The court then denied defendant's motion for a continuance as untimely and disruptive, but reiterated that it would allow private counsel to substitute into the case if he could proceed at 1:30 p.m. The court then allowed defendant time to make a telephone call to the private attorney.

The parties went forward with motions in limine, and later the court noted for the record that the private attorney was not present. Defendant stated he had not hired the attorney and the court responded that trial would begin.

³Defendant does not appeal the denial of the *Marsden* motion.

B. Analysis

Trial courts must make reasonable efforts to ensure that a defendant who is financially able to retain an attorney of his own choosing can be represented by that attorney. (*People v. Crovedi* (1966) 65 Cal.2d 199, 205-206.) But a defendant's right to be represented by private counsel is not absolute, and the granting of a continuance for this purpose is generally a matter within the discretion of the trial court. (*Id.* at pp. 206-207; *People v. Courts* (1985) 37 Cal.3d 784, 790.) The right to counsel of choice must yield when it would cause an unreasonable disruption in the orderly process of justice. (*People v. Crovedi, supra*, at p. 208.) There is no established test for determining when to deny a continuance to substitute counsel. Rather, "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (*Id.* at p. 207; *Ungar v. Sarafite* (1964) 376 U.S. 575, 589-590.) The court may deny a request for a continuance to substitute counsel "if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.' [Citation.]" (*People v. Courts, supra*, 37 Cal.3d at pp. 790-791.)

Here, defendant named the private attorney he wished to retain, but, apart from this statement, nothing else suggested defendant's retention of private counsel was more than speculative. Defendant had made no efforts to obtain private counsel during the first three months of the case. He had spoken to a private attorney only the night before trial, however, was "two thousand dollars short," then commented that the victim wanted to give him the rest of the money for the lawyer. The private attorney did not call the court or make an appearance, and defendant was not able to produce him on the day of trial. Further, the court did not find persuasive defendant's reasons for relieving the public defender and obtaining private counsel. Instead, the court determined the impediment to communication between defendant and the public defender, and the lack of progress made in investigating the case, were of defendant's own making. The court recognized

that these issues were a product of defendant's adamant belief that the failure of his victim to testify ensured a positive outcome. In light of these circumstances, we cannot say that the court abused its discretion in denying the motion for a continuance as untimely and disruptive or that the court violated defendant's due process rights or his right to counsel of choice.

II. Evidence of prior acts of domestic violence

Defendant also contends the trial court erred by admitting evidence of defendant's prior acts of domestic violence against Doe. He argues the evidence was admitted in violation of Evidence Code section 352⁴ because the prior acts were more inflammatory than the charged act, likely confused the jury, and consumed twice the trial time of the charged act. In addition, defendant argues the evidence was admitted in violation of his constitutional right to due process.

A. Prior acts

Over defense objection, the prosecution presented evidence of the following two prior acts of domestic violence committed by defendant against Doe.

On October 20, 1996, Officer Greg Smith was dispatched to Doe's house. When he arrived, Doe was emotionally upset, scared, and crying. Her neck was red and she had a scratch above her eye and behind her ear. She said that she and defendant had been in an on-again, off-again relationship for about four years and that defendant had just moved back in three weeks earlier. She wanted Smith to make defendant leave but not arrest him because he had threatened her. Smith placed defendant in the patrol car. Doe told Smith that defendant punched and choked her during an argument about money. When Doe's then 10-year-old son tried to intervene, defendant struck him on top of his head. Doe got defendant to calm down, and then he demanded that they go to the bank and

⁴All statutory references are to the Evidence Code unless otherwise noted.

withdraw \$80 for defendant so he could stay at a motel. When they returned to the house, defendant became irate again and punched and choked Doe. Doe's son again tried to intervene and defendant struck him. Doe tried to run away from defendant and he ripped her shirt. Her son ran out of the room and called 911. Defendant threatened to kill Doe if the police were called. He broke a glass coffee table and the fireplace glass, dismantled a telephone and threw it against the wall, creating a hole in the wall and destroying the telephone. Smith obtained an emergency protection order to keep defendant away from Doe.

On March 9, 1999, Smith was again dispatched to Doe's house. When he and another officer arrived, they heard frantic yelling and screaming from inside the garage. Inside, Doe was very upset and crying. Her neck was red and she had a scratch on her chest. Doe's son's neck was red and he had a mark on his face. Smith detained defendant. Doe told Smith that defendant had only recently moved back in with her. They argued over photographs of defendant's girlfriend; defendant told Doe he would "kick her ass" if she had thrown them in the garbage. Defendant yelled and called her names, then choked her and hit her numerous times on the face and head. Back in the house, defendant pulled Doe by the hair into the spare bedroom as he continued to yell at her. Doe's son came into the bedroom, but Doe told him to run and hide. He left the bedroom but returned with a small stick and hit defendant with it. Defendant released Doe and struck her son. Doe ran from the room and called 911. When she returned, she saw defendant on top of her son. Defendant started attacking her again, choking her. He ordered her back into the garage where they continued to argue. Defendant picked up a shovel and told Doe he was going to hit her with it. The police arrived as defendant was threatening Doe with the shovel and calling her names. Smith arrested defendant and obtained an emergency protective order for Doe. When Smith questioned defendant, he repeatedly stated that he did not hit anyone. Eventually, he admitted that he had hit Doe

in the 1996 incident, but not on this night. He stated that Doe's son had hit him for no reason.

B. Section 352

Section 1109 is an exception to the rule against presenting evidence of prior acts to demonstrate that the defendant has a propensity to commit such acts.

“‘The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases. Not only is there a great likelihood that any one battering episode is part of a larger scheme of dominance and control, that scheme usually escalates in frequency and severity. Without the propensity inference, the escalating nature of domestic violence is likewise masked. If we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner. Since criminal prosecution is one of the few factors which may interrupt the escalating pattern of domestic violence, we must be willing to look at that pattern during the criminal prosecution, or we will miss the opportunity to address this problem at all.’ [Citation.]” (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1027 -1028.)

Admission of such evidence, however, remains subject to a section 352 analysis, which permits the trial court, in its discretion, to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (§ 352.) “The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.” (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) “Rather, the statute uses the word in its etymological sense of ‘prejudging’ a person or cause on the basis of extraneous factors. [Citation.]” (*People v. Farmer* (1989) 47 Cal.3d 888, 912, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) The trial court’s exercise of discretion under section 352 will not be disturbed on appeal

unless the court clearly abused its discretion, that is, unless the prejudicial effect of the evidence clearly outweighed its probative value. (*People v. Lucas* (1995) 12 Cal.4th 415, 449.)

We see no abuse here. The probative value of defendant's prior acts of violence against Doe was strong. The evidence was indicative of, and tended logically to establish, defendant's propensity to commit physically and verbally abusive acts against Doe and to thereby exert his control over her. (See *People v. Hoover, supra*, 77 Cal.App.4th at p. 1029 [similar conduct against the same victim is highly relevant]; *People v. Harris* (1998) 60 Cal.App.4th 727, 739-740 [other crimes evidence must tend to prove logically and by reasonable inference the issue upon which it is offered, it must be offered on an issue material to the prosecution's case, and not be merely cumulative].)

The prejudicial factors in this case did not outweigh the compelling probative value of the evidence. (*People v. Harris, supra*, 60 Cal.App.4th at pp. 737-741 [inflammatory nature of the evidence, probability of confusion, remoteness, and consumption of time are factors to be weighed against probative value of evidence].) The prior acts were not much more inflammatory or shocking than the charged act. They involved hitting and choking, while the charged act concerned hitting and dragging and scratching Doe's eyelids, a particularly vicious and perverse act. Each act inflicted injuries, although none apparently required medical attention. Each involved abusive verbal assaults. And, although the charged act did not include violence against Doe's son (who was on this occasion prevented from physically intervening by defendant's act of locking the door), he was again present and involved.

Defendant contends that because the jurors were not informed that defendant was convicted of the prior acts, they would be inclined to believe those acts unjustly had gone unpunished. We conclude this result is unlikely. Contrary to many cases of domestic abuse, these prior acts *were* reported. As a result, in both prior situations, the police responded and presumably dealt with defendant appropriately.

Finally, the prior acts were not remote in time, and the testimony describing them did not consume an unreasonable amount of trial time in that each of the three incidents consumed about the same amount of transcript, approximately 13-15 pages each. In any event, the combined total testimony describing the three acts only consumes approximately 45 pages of transcript—not overly long by any standard.

C. Due process

The appellate courts have repeatedly rejected challenges to section 1109 on due process grounds. (*People v. Hoover, supra*, 77 Cal.App.4th at pp. 1025-1029; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. James* (2000) 81 Cal.App.4th 1343, 1353; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1310; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1331-1334; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-419.) These cases relied on *People v. Falsetta* (1999) 21 Cal.4th 903, in which the Supreme Court concluded that a similar statute, section 1108, did not violate due process because the trial court’s discretion to exclude evidence under section 352 provides a procedural safeguard against prejudice. We likewise conclude *Falsetta*’s analysis is applicable to section 1109 and, for the reasons explained in these cases, reject defendant’s due process challenge to the statute.

DISPOSITION

The judgment is affirmed.

Wiseman, J.

WE CONCUR:

Buckley, Acting P.J.

Levy, J.